

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of
Federal-State Joint Board on
Universal Service

)
) CC Docket No. 96-45
)

TO: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
WASHINGTON, DC 20554

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PETITION FOR RECONSIDERATION OF SMALL WIRELESS CARRIER GROUP

**BUSINESS SERVICE CENTER, INC.
MOBILE PHONE OF TEXAS, INC.
3 RIVERS PCS, INC.**

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SUMMARY

Business Service Center, Inc.; Mobile Phone of Texas, Inc.; and 3 Rivers PCS, Inc. petition for reconsideration of the "safe harbors" for reporting the interstate revenues of cellular, PCS and paging carriers, which were adopted in the Commission's Memorandum Opinion and Order And Further Notice Of Proposed Rulemaking (Federal-State Joint Board on Universal Service), CC Docket No. 96-45, FCC 98-278, released October 26, 1998.

The petitioners are small cellular, PCS and paging providers which carry virtually no interstate traffic. Their customers are predominately small, local businesses that employ wireless service for local purposes only.

The Commission adopted its 15 percent and 12 percent "safe harbors" with no consideration for the traffic patterns of small wireless carriers. These guidelines far exceed the interstate traffic actually carried by small, local paging, cellular and PCS providers.

Moreover, the "safe harbors" discriminate against small wireless carriers with little or no actual interstate revenues by giving them the "choice" of reporting higher interstate revenues and making unwarranted universal service contributions, or facing onerous and expensive documentation requirements and audit risks.

If the Commission wishes to establish a reasonable "safe harbor" for small wireless carriers, the one percent interstate factor adopted for analog SMR providers more accurately reflects their service areas, customer bases and traffic patterns.

In the Matter of)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)

PETITION FOR RECONSIDERATION OF SMALL WIRELESS CARRIER GROUP

The "safe harbor" guidelines were adopted with no consideration for the traffic patterns and administrative resources of small local paging, cellular and Personal Communications Service ("PCS") carriers. The 12 percent (paging) and 15 percent (cellular/PCS) "safe harbors" far exceed the interstate traffic

¹ This proceeding is a notice and comment rulemaking to which the reconsideration provisions of Section 1.429 of the Commission's Rules would normally apply. However, the "safe harbor" guidelines for which reconsideration is sought were not adopted after notice and comment.

of small, local wireless carriers, and subject them to onerous and expensive documentation, traffic study and audit requirements if they use more accurate interstate factors to calculate their federal universal service contribution obligations. If the Commission wishes to establish a reasonable "safe harbor" for small local wireless carriers, the one percent interstate factor adopted for substantially similar analog Specialized Mobile Radio ("SMR") providers more accurately reflects their service areas, customer bases and traffic patterns.

Background

The members of the Small Wireless Carrier Group are small, local carriers that carry little or no interstate traffic. Their subscribers are predominately small, local businesses which employ wireless service primarily to maintain contact with their offices, employees, vehicles and customers within the local area, while originating and terminating virtually no interstate calls.

BSC is a small carrier which provides paging service in and around Wausau, Irma, Stevens Point and adjacent portions of rural north central Wisconsin. Its customer base is comprised of local businesses, farmers and professionals, which use its services to maintain contact with offices, employees, customers and family members within the local north central Wisconsin service area. BSC offers no 800 or other toll-free dialing options, and estimates that far less than one percent of the traffic carried over its system originates or terminates outside of Wisconsin.

MPT is a small carrier which provides paging service in and

around Wichita Falls, Mineral Wells, Graham, Breckinridge and adjacent portions of rural north central Texas. Its subscribers are local businesses, oil exploration companies, ranchers, farmers and professionals, which use its services to maintain contact with offices, employees, customers located within the local north central Texas service area. MPT estimates that approximately one percent of the paging traffic carried over its system originates or terminates outside of Texas.

3RPCS is a small, independent PCS operator, which provides (or will soon provide) service in and around Great Falls, Helena, Billings, Butte, Bozeman and adjacent portions of rural central and south central Montana. Its customers are local businesses, ranchers and residents which communicate virtually entirely with other local Montana businesses and residents. Whereas 3RPCS has found it necessary to offer toll-free intrastate calling within Montana, it has not yet perceived any significant demand by existing or potential customers for interstate toll calling plans. 3RPCS estimates that well less than five percent of its revenues are derived from interstate calls.

**The "Safe Harbor" Percentages Are Arbitrary
And Unreasonably High With Respect To Small Carriers**

The Commission adopted its 15 percent and 12 percent "safe harbors" for cellular, PCS and paging carriers without affording small wireless carriers and other interested parties any notice or opportunity to comment, without gathering and evaluating any supporting evidence (much less, substantial supporting evidence) regarding the interstate traffic patterns of small wireless

carriers, and without considering the relevant factors and circumstances affecting small wireless carriers. The Commission's characterization of the "safe harbor" guidelines as "interim" does not excuse or mitigate these defects in its administrative decision process, for some "interim" Commission rules and guidelines have remained in effect for years. See, e.g., Report And Order And Further Notice Of Proposed Rulemaking (Transport Rate Structure and Pricing), CC Docket No. 91-213, 7 FCC Rcd 7006 (1992) (dealing with interim transport rate structure and pricing which remained in effect for years).

The Commission's 15 percent "safe harbor" for cellular and PCS carriers bears no relationship whatsoever to the interstate traffic patterns of any discernible wireless carrier, much less to those of small cellular or PCS carriers. Rather, the Commission based its number on the wholly unrelated "level of interstate traffic experienced by **wireline** providers [emphasis added]." MO&O, para. 13. Specifically, the Commission set its cellular and PCS "safe harbor" in reliance solely upon "[c]urrent Commission statistics indicat[ing] that the nationwide average percentage of interstate wireline traffic reported for purposes of the DEM weighting program is approximately 15 percent." Id. The Commission stated that it did "not have evidence before us to indicate that the level of interstate wireless traffic experienced by cellular and broadband PCS providers is less than the level experienced by wireline providers." Id.

However, the Commission also had no evidence before it that

the percentage of cellular or PCS traffic which is interstate bears any reasonable or tangible relationship (much less, that it is substantially equivalent) to any wireline national average or other measure the interstate portion of wireline traffic. Because cellular and PCS users generally pay usage-based charges for airtime as well as for toll calls while most wireline users pay usage-based charges only for toll calls, many cellular and PCS users defer making discretionary interstate toll calls until they can use their wireline telephone at work or home². Hence, even the traffic of large national and regional cellular and PCS providers may be less than 15 percent interstate. In any event, the Commission plainly and erroneously adopted its "safe harbor" for cellular and PCS providers without collecting any evidence regarding their interstate usage and traffic patterns.³

For small cellular and PCS carriers, the percentage of interstate traffic is far less than 15 percent. Because small, local cellular and PCS carriers cannot advertise and provide the same types of national and regional service plans as the larger national and regional cellular and PCS providers, they have

² AT&T's Digital One Rate and similar calling plans may change wireless traffic patterns in the future. However, at present, it is too soon to determine the extent of their adoption or their impact upon the market.

³ The Commission noted that cellular and PCS providers have not, as a group, reported "sufficiently similar" percentages of interstate revenues on their previous Universal Service worksheets. MO&O, para. 13. Given that the cellular and PCS carriers reported disparate patterns among themselves, it was arbitrary and unreasonable for the Commission to disregard these variations and substitute instead the wholly unrelated national average of the more homogenous wireline local exchange carriers.

focused more upon offering localized wireless services to farms, ranches, small firms and others whose wireless communication needs are primarily limited to the local calling area. These smaller, local subscribers simply do not originate or receive many interstate calls on their wireless phones (particularly when their local calling area is located well inside the state border). As indicated above, 3RPCS estimates that less than one percent of its traffic is interstate.

The Commission's 12 percent "safe harbor" for paging carriers is equally arbitrary and unreasonable with respect to small local paging carriers. It was based solely on the assertion that "paging providers, as a group, reported on the Worksheets due on March 31 [1998] that approximately 12 percent of their paging revenues generated in the 1997 calendar year was interstate." MO&O para. 14.

The Commission's reliance upon "group" data means that its paging "safe harbor" is significantly affected by the traffic patterns of the large national and regional paging carriers⁴. These large carriers offer toll-free numbers which can be accessed by out-of-state callers and transmit pages which can be received in multiple states. Given the large sizes, revenues and customer bases of these national and regional paging carriers, their interstate traffic patterns will dominate any calculation of a single "safe harbor" interstate traffic percentage for the

⁴ The Commission also offers no indication that it made any attempt to determine whether calendar year 1997 was a typical year with respect to paging traffic patterns.

entire "group" of paging carriers.

For small paging carriers, the percentage of interstate traffic is far less than the 12 percent average for the nationwide "group" as a whole. Because small paging carriers cannot offer the national and regional coverage and toll-free call-in numbers of their larger competitors, they have focused more upon providing localized paging services to small businesses, farms, ranches and others whose wireless communication needs are primarily limited to the local calling area. These smaller, local customers simply do not need to be paged from out-of-state locations, or to receive pages in multiple states (particularly when their local calling area is located well inside the state border). As indicated above, BSC and MPT estimate that less than one percent of their paging traffic is interstate.

**The Arbitrary And Unreasonably High
Safe Harbor Percentages Unfairly Burden Small Carriers**

The Commission's "safe harbors" discriminate against small wireless carriers having little or no actual interstate revenues by giving them the "choice" of reporting higher interstate revenues and making unwarranted universal service contributions, or facing onerous and expensive documentation requirements and audit risks.

The Commission has recognized that wireless carriers have difficulty distinguishing their interstate traffic and revenues from their intrastate traffic and revenues. MO&O, paras. 6-7. These difficulties arise from limitations in technical equipment and recordkeeping systems, as well as from the mobile nature of

wireless traffic.

The members of the Small Wireless Carrier Group have determined from their operating experience and knowledge of their customers that less than one percent of their revenues are derived from interstate traffic. However, documenting and proving this fact is very time consuming and expensive. Most small paging carriers have never previously had any reason to develop or purchase systems to identify, record and analyze the location of incoming paging calls. Whereas cellular and PCS carriers record outgoing toll calls and are developing systems to identify and record incoming calls for "calling party pays" purposes, most small cellular and PCS carriers have not yet implemented the latter systems. Hence, in order to document that very little of their traffic is interstate, the Small Wireless Carrier Group and other small wireless carriers will have to acquire and install expensive call monitoring and recording systems (if and when such systems are available); conduct expensive and intrusive customer usage surveys; or undertake time-consuming, expensive and intrusive monitoring of traffic and traffic records. Given the variety of service plans offered by some wireless carriers to their customers, the percentage of traffic classified as interstate will not necessarily be equal to the percentage of revenues that are interstate. Rather, further analyses, calculations and assumptions will be necessary to derive and estimate interstate revenue percentages from interstate traffic data.

In addition to the time and expense of preparing supporting documentation, small carriers employing traffic factors lower than the "safe harbors" will bear the risk of audits or other reviews by the Commission and/or the universal service Administrator. MO&O, paras. 11, 13, 14. Such audits and reviews are time-consuming and expensive, and can place particularly severe strains upon the resources of small carriers.

If small wireless carriers wish to avoid the documentation costs and audit risks of reporting their accurate interstate revenue percentages, their alternative is to use the Commission's 12 percent or 15 percent "safe harbor." In many cases, this will force small wireless carriers to pay \$10,000 or more in federal universal service contributions for which they otherwise would not have been obligated.

For example, assume that small paging carrier ABC had \$1 million in revenues during 1997, and that one percent of these revenues were accurately attributable to interstate traffic. If ABC were able to document this interstate usage and bear the risk of an audit, it would have a universal service contribution obligation less than the \$10,000 exemption and therefore pay nothing to the fund.

<u>USF Fund</u>	<u>Revenue</u>	<u>Factor</u>	<u>Contribution</u>
School/Library	\$1,000,000 (total)	0.0075	\$7,500
High Cost	10,000 (interstate)	0.0310	310

TOTAL			\$7,810 = \$0

In contrast, if small paging carrier ABC were unable to document its accurate interstate percentage or bear the risk of

an audit, it would be forced to employ the 12 percent "safe harbor" and to make a universal service contribution of \$11,220 for the very same operation.

<u>USF Fund</u>	<u>Revenue</u>	<u>Factor</u>	<u>Contribution</u>
School/Library	\$1,000,000 (total)	0.0075	\$7,500
High Cost	120,000 (interstate)	0.0310	3,720

TOTAL			\$11,220

In other words, unreasonably high "safe harbors" not only will require universal service contributions from many small carriers intended to be exempted, but also will do so by injecting an initial "quantum leap" of \$10,000 into such contributions.

**Analog SMR Providers Serve Markets And Customers
Very Similar To Small Cellular, PCS And Paging Carriers**

Analog SMR providers are small carriers which furnish predominately local dispatch services to small businesses. Their typical customers are small local firms which use the service to maintain contact with their vehicles as they operate within the local service area. Analog SMR customers normally do not want or need to originate or receive interstate toll calls. Consequently, the Commission's one percent "safe harbor" for analog SMR providers is reasonably accurate.

As discussed above, Small Wireless Carrier Group members and other small wireless carriers serve local "niche" markets much like those of analog SMR providers. Neither small cellular, PCS and paging carriers nor analog SMR carriers operate or advertise on a national or regional basis. Both classes of carriers serve limited local markets, and predominately attract small business and residential customers with virtually no need or demand for

interstate service. Both classes of carriers derive only a very small portion (often less than one percent) of their revenues from interstate traffic.

It is well established that the Commission must justify disparate treatment of similarly situated parties. Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965) (Commission must explain different treatment); McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment).

Given that small cellular, PCS and paging carriers have localized service markets, local customer bases and local calling patterns substantially similar to those of analog SMR providers, the Commission should employ the same one percent "safe harbor" for both classes of small wireless carrier. Specifically, the Commission should reconsider its MO&O and declare that cellular, PCS and paging carriers that meet the current Commission and Small Business Administration standard for "small entity" (MO&O, paras. 60-62), and that have operations in only one state, will have a "safe harbor" of one percent for reporting their "percentage of interstate wireless telecommunications revenues" for universal service contribution and related purposes.

Conclusion

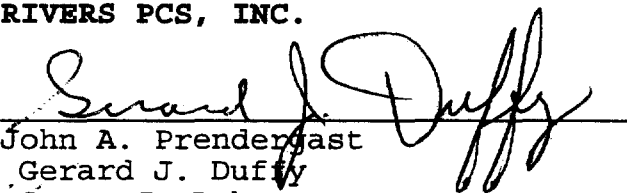
The Commission should reconsider and reduce to one percent, the 12 percent and 15 percent "safe harbors" adopted in the MO&O and made applicable to small local paging, cellular and PCS

carriers. These guidelines were adopted with no consideration for the traffic patterns and administrative resources of small carriers, and far exceed the levels of interstate traffic actually carried by small, local paging, cellular and PCS providers. These guidelines penalize small wireless carriers by subjecting them to onerous and expensive documentation, traffic study and audit requirements if they use more accurate estimates of their interstate traffic to calculate their federal universal service contribution obligations. If the Commission wishes to establish a reasonable "safe harbor" for small local wireless carriers, the one percent interstate factor adopted for substantially similar analog SMR providers more accurately reflects their service areas, customer bases and traffic patterns.

Respectfully submitted,

**BUSINESS SERVICE CENTER, INC.
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January 11, 1999

CERTIFICATE OF SERVICE

I, Sharmon B. Truesdale an employee with the law firm of Blooston, Mordkofsky, Jackson & Dickens, certify that on this 11th day of January 1999, I have caused to be hand-delivered copies of the foregoing "Petition for Reconsideration of Small Wireless Carrier Group" to:

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